

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11	MARKEL RAY MORGAIN,)	No. C 10-05377 EJD (PR)
12	Petitioner,)	ORDER DENYING PETITION FOR
13	vs.)	WRIT OF HABEAS CORPUS;
14)	DENYING CERTIFICATE OF
15	BRENDA M. CASH, Warden,)	APPEALABILITY
16	Respondent.)	
17	<hr/>		

Petitioner has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state conviction. The Court found that Petitioner had raised three cognizable claims for federal habeas relief, and ordered Respondent to show cause why the writ should not be granted. Respondent filed an answer addressing the merits of the petition, and Petitioner filed a traverse. Having reviewed the papers and the underlying record, the Court concludes that Petitioner is not entitled to federal habeas corpus relief and will deny the petition.

BACKGROUND

Petitioner was found guilty by a jury in Contra Costa County Superior Court of first degree murder. Petitioner was sentenced to fifty-one years to life in state

1 prison on April 11, 2008. Petitioner appealed his conviction, with the state high
2 court denying review. Petitioner filed the instant federal petition on November 29,
3 2010.

4

5 FACTUAL BACKGROUND

6 The following facts are taken from the opinion of the California Court of
7 Appeal:

8 *The Incident*

9 On June 18, 2007, [Petitioner's] cousin, Cecil Walker, was at
10 his apartment on Trigger Road in Rodeo when he heard noise behind
11 the apartment complex. He walked outside and saw [Petitioner]
playing dice behind the complex with several people, including
Corey "Corndog" Tidwell. [FN2]

12 FN2. [Petitioner's] nickname is "Boo." There were at least
13 two other men playing dice that day, including Steve and
"Ant."

14 Walker saw [Petitioner] pull a gun from his waist and point it
15 at Tidwell. Walker heard gunshots; then Tidwell yelled, "Quit, Boo"
16 and "Don't do it. Don't Do it, not me." Walker ran away because he
17 was "[a]fraid of shots being fired and one hit[ting] [him]." He did not
have a gun and did not shoot Tidwell. During an interview with
18 Detective Michelle Day, Walker initially lied about witnessing the
incident because he feared being perceived as a "snitch." Walker
eventually told Day what he saw. At trial, Walker admitted being a
convicted felon and receiving immunity for his testimony.

19 On the day of the incident, 12-year-old Eli. was at her friend
20 Michelle's residence at the apartment complex on Trigger Road
21 when she saw a Black man behind the complex. The man was
pointing a gun at Tidwell. Tidwell ran and Eli. heard one or two
22 gunshots. Tidwell slipped and fell to the ground; the man ran up to
him and shot him several times. Then he took money from Tidwell's
23 wallet and ran. The man was about six feet tall and wore his hair in
eye-level dreadlocks. Detective Day showed Eli. a picture of
24 [Petitioner] and she recognized him as the person who shot Tidwell.
She also told Day, however, that [Petitioner] "[k]ind of" looked like
25 the man who shot Tidwell. Eli. was not able to identify [Petitioner] at
trial and conceded she did not want to testify because she was
scared. Eli. did testify, however, that Walker did not shoot Tidwell.

26 Michelle was at the apartment complex with Eli. when she
27 heard four or five gunshots. She looked out her apartment window
and saw Tidwell on the ground; then she saw a man run up to
28 Tidwell and start shooting at him. The shooter went through
Tidwell's pockets and ran toward the back of the apartment complex.

1 Michelle did not get a good look at the shooter's face, but she saw he
 2 was a light-skinned Black man. She thought the shooter had "a little
 3 bit of hair" but not dreads or "twisties." Michelle was not able to
 4 identify the shooter when she spoke to police after the incident.
 5

6 Brittany Tozier-Ricketts was in her apartment when she heard
 7 "fire cracker sounds." She looked out her front door and saw three
 8 men, one of whom had a gun in his hand. She saw the victim run and
 9 the man with the gun shoot in the victim's direction. The third man –
 10 who did not have a gun – run along a path between two buildings. At
 11 that point, the shooter "fire[d] off a couple more rounds[.]" Ricketts
 12 was unable to see more because her mother-in-law and sister-in-law
 13 blocked her view.

14 According to Ricketts, the shooter was Black, had a [l]ight to
 15 medium" skin tone, and was wearing a white t-shirt and jeans. He
 16 had short hair that "looked like it was shaved closely to the head."
 17 Ricketts did not pay much attention to the shooter's hair, but she
 18 remembered it "looked kind of short" and was not braided. Ricketts
 19 did not get a good look at the shooter's face and was unable to
 20 identify him in a photo lineup. At trial, Ricketts testified that
 21 although she could not be sure, [Petitioner] looked similar to the
 22 shooter because of his hair, skin tone, and build.

23 Rickett's mother-in-law, Lynda Tozier, was also in her
 24 apartment when she heard what she thought were fire crackers.
 25 Tozier called 911 and ran outside. She saw Walker in the parking lot,
 26 running towards his apartment. He did not have a gun in his hands.
 27 She also saw another man "running around back of the apartments."
 28 She did not see the other man's face or hands but she noticed he was
 1 wearing a white t-shirt and jeans and had a "close-shaved" hairstyle.
 2 After the two men ran away, Tozier walked toward the victim's body
 3 and noticed he was "already deceased."

4 Tozier's daughter, Chartina, saw a Black man shoot at
 5 Tidwell, go through his pockets, and run away. Chartina did not get a
 6 good look at the shooter's face, but she noticed he was between 5'9"
 7 and 6 feet tall, had a relatively slender build, and had a short, clean-
 8 cut hairstyle. The shooter did not have dreadlocks or "twisties." The
 9 shooter had a medium skin tone and wore a white t-shirt and jeans.
 10 At trial, Chartina testified that [Petitioner]'s skin tone, hair, and
 11 height looked similar to the shooter's.

12 Tidwell's stepson saw several people, including [Petitioner]
 13 and Tidwell, playing a game of dice on the day of the incident.
 14 [Petitioner] was wearing blue jeans and a white t-shirt and wore his
 15 hair in "twisties" which hung down to his earlobes.

16 *The Investigation*

17 Detective Day investigated the incident. She determined
 18 [Petitioner] was 25 years old, 5'9", and weighed approximately 165
 19 pounds. [Petitioner] had "short hair, possibly cornrows.. [with] some
 20 little braids hanging down" a few inches below his ears. Day showed
 21 Eli. a photo lineup; when Eli. saw [Petitioner]'s picture, she gasped,

1 “her eyes got big, and she nodded her head up and down in a yes
 2 motion.” Eli. said she saw [Petitioner] at the YMCA earlier that
 3 week and again on the day of the incident, “[w]hen he shot”
 4 Tidwell. Eli. also said [Petitioner] had “short dreads” on the day of
 5 the incident. She told Day, however, she could not be completely
 6 sure [Petitioner] was the person who shot Tidwell because a lot of
 7 people in the neighborhood look alike. Police found the handgun
 8 used during the incident but were unable to locate any fingerprints or
 9 DNA on it.

10 *Marquita Wallace’s Refusal to Testify*

11 The People advised the court they intended to call Wallace,
 12 [Petitioner]’s girlfriend, as a witness at trial. They sought – and
 13 obtained – a subpoena on the grounds that she was a material witness
 14 because she told police [Petitioner] confessed to the shooting. The
 15 police located Wallace and kept her on house arrest until trial.

16 Before trial, defense counsel filed a motion in limine asking
 17 the court to “resolve the prosecution’s primary witness, Marquita
 18 Wallace’s issue on whether she will exercise her Fifth Amendment
 19 right and not testify, whether the prosecution will grant her immunity
 20 or whether she will refuse to comply with any court order
 21 compelling her to testify.” Defense counsel contended that if
 22 Wallace chose not to testify, “any and all previous statements [she]
 23 made to police concerning [Petitioner]’s involvement [in the
 24 incident] should be excluded as a violation of his Sixth Amendment
 25 Right and Due process rights to confront... witnesses against him[.]”

26 At the hearing on the motion, Wallace’s counsel informed the
 27 court that if called to testify, Wallace would invoke her privilege
 28 against self-incrimination because of a pending felony charge. The
 1 court advised the parties that if Wallace asserted the privilege, it
 2 would permit the prosecution to offer Wallace immunity. If the
 3 prosecution offered Wallace immunity, then “she’ll be given that
 4 [immunity] and instructed to answer the questions. We’ll bring in the
 5 jury. We’ll have her asked questions and see what she does.” If
 6 Wallace continued to refuse to answer, the court stated it would
 7 “order [her] to answer... with the penalty of possibly being held in
 8 contempt, and we’ll see what she does, and then we’ll go from
 9 there.”

10 During trial, Wallace informed the court she would refuse to
 11 testify even if the prosecutor granted her use immunity. After the
 12 prosecutor agreed to grant Wallace immunity, the court ordered her
 13 to testify. Wallace took the witness stand and testified she was
 14 [Petitioner]’s girlfriend and the mother of his child. Wallace stated
 15 she lived with [Petitioner] when the incident occurred. When the
 16 prosecutor asked Wallace whether she knew a man named Victor
 17 Campbell, she responded, “I ain’t answering it.” After the court
 18 ordered Wallace to answer the question, she admitted Campbell was
 19 her cousin and that he spent time with [Petitioner]. Wallace also
 20 testified Campbell did not come to her house on the day of the
 21 shooting and that [Petitioner] did not tell her he and Campbell were
 22 going to Walker’s house.

1 When Wallace stated she did not recall talking to the police
 2 after the incident, the prosecutor showed Wallace a statement she
 3 made to police to refresh her recollection. Wallace said the statement
 4 did not refresh her recollection, and the following colloquy occurred:
 5

6 “PROSECUTOR: Okay. Didn’t you tell the police, Ms.
 7 Wallace, that [] Campbell came over to your house on the day of
 8 Tidwell’s shooting? You told that to the police, didn’t you?

9 “WALLACE: No, I did not.

10 “PROSECUTOR: And you told the police, didn’t you, Ms.
 11 Wallace, that [] the defendant, the father of your child, told you that
 12 he and Campbell were going to go over to his cousin’s, [Walker’s]
 13 house that day?

14 “WALLACE: No.

15 “PROSECUTOR: You never told that to the police?

16 “WALLACE: No.

17 “PROSECUTOR: You, in fact, were not happy about the
 18 defendant going over to [] Walker’s house with [Campbell], were
 19 you?”

20 Wallace asked to speak with her lawyer. After she did, the
 21 prosecutor continued questioning her.

22 “PROSECUTOR: You weren’t happy, Ms. Wallace, that
 23 [Petitioner]... was going over to Cecil Walker’s house with Mr.
 24 Campbell, were you? ¶...

25 “WALLACE: Not answering it... ¶...

26 “PROSECUTOR: Okay, you weren’t happy, Ms. Wallace,
 27 that [Petitioner] was going over to Cecil Walker’s house with Mr.
 28 Campbell, were you?

29 “WALLACE: Not answering it. I refuse to answer.

30 “PROSECUTOR: Did the defendant tell you he shot
 31 [Tidwell]?

32 “WALLACE: Not answering it.

33 “PROSECUTOR: Did he tell you that he shot him in the
 34 hand? Did he tell you that he shot [Tidwell] in the hand, Ms.
 35 Wallace?”

36 At that point, counsel for Wallace objected that the prosecutor
 37 was badgering the witness. The court overruled the objection and
 38 ordered Wallace to answer the question. The prosecutor then asked:

39 “PROSECUTOR: Did the defendant tell you that after he shot

1 [Tidwell] in the hand that the victim then said, ‘No man, don’t shoot
2 me, don’t shoot me, don’t shoot me.’ Did he tell you that?...

3 “WALLACE: (No response.)

4 “THE COURT: Ms. Wallace, I’m going to order that you
answer that question or you’ll be held in contempt.

5 “WALLACE: I’m not answering it.

6 “THE PROSECUTOR: Did the defendant tell you that he
7 then shot him four more times? Did he tell you that he then shot
[Tidwell] four more times?”

8 The court overruled defense counsel’s due process and
9 confrontation clause objections and ordered Wallace to answer the
question. She refused and, outside the presence of the jury, the court
10 held her in contempt.

11 Later in the trial, defense counsel moved to strike Wallace’s
12 testimony. The court granted the motion and struck Wallace’s
13 testimony. It permitted the prosecutor, however, to argue the jury
14 could infer from Wallace’s refusal to testify that she was “doing it to
15 cover up for the defendant[.]” The court explained the prosecutor
16 could “argue the inference that her refusing to testify with no legal
17 right to do so, is she’s doing it on behalf of – she has a motive to
18 protect [Petitioner].” The court, however, precluded the prosecutor
19 from “discuss[ing] specific testimony” because defense counsel “
20 never had an opportunity to cross [examine Wallace].” Defense
21 counsel did not object to the court’s ruling.

17 *Closing Argument*

18 Before closing argument, the court informed the jury it was
striking Wallace’s testimony “entirely.” During his rebuttal
19 argument, the prosecutor noted the “overwhelming impact of
20 Marquita Wallace and her significance in this case. [¶] Marquita
21 Wallace refused to testify, and you can consider that... And.. the only
22 reasonable interpretation... [is] that she is protecting the defendant.
23 And you can consider that. And you are entitled to consider that.
24 You can. [¶] The smoke screen that was put up by the defense... is
25 just parted when one looks at all of the evidence, every witness, and
then Marquita Wallace as well, who is clearly, based upon the
evidence, and the reasonable interpretation, the only thing she’s
protecting him by refusing to testify and simply answer basic
questions[.]” The prosecutor then commented, “the issue is
protecting from what? Protecting from conviction. Because in this
case the defendant, in fact, committed the murder.” Defense counsel
did not object. [FN4]

26 FN4. At trial, the court admitted an audiotape and transcript
27 of [Petitioner]’s jailhouse conversation where [Petitioner]
spoke to another man and told him “mum’s the word,” and
28 that a man named “Super Dog” needed to “hit his mute
button.” [Petitioner] then stated Super Dog was planning to

1 “be there Thursday” and asked whether anyone had visited
2 Super Dog or spoken to him. During closing argument, the
3 prosecutor urged the jury to conclude [Petitioner] was
4 referring to Walker during the conversation. At trial, Walker
5 denied having a nickname and none of the testifying
6 witnesses referred to him as “Super Dog.”

7 After deliberating for three days and requesting readback of
8 certain testimony, the jury convicted [Petitioner] of first degree
9 murder. The court sentenced [Petitioner] to 51 years to life in state
10 prison with 248 days of presentence custody credit.

11 People v. Morgain, No. A121530, slip op. at 2-8 (Cal. Ct. App. Sept. 4, 2009) (Ans.
12 Ex. 2).

13 DISCUSSION

14 I. Standard of Review

15 This Court may entertain a petition for a writ of habeas corpus “in behalf of a
16 person in custody pursuant to the judgment of a State court only on the ground that
17 he is in custody in violation of the Constitution or laws or treaties of the United
18 States.” 28 U.S.C. § 2254(a). The writ may not be granted with respect to any
19 claim that was adjudicated on the merits in state court unless the state court’s
20 adjudication of the claim: “(1) resulted in a decision that was contrary to, or
21 involved an unreasonable application of, clearly established Federal law, as
22 determined by the Supreme Court of the United States; or (2) resulted in a decision
23 that was based on an unreasonable determination of the facts in light of the evidence
24 presented in the State court proceeding.” Id. § 2254(d).

25 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if
26 the state court arrives at a conclusion opposite to that reached by [the Supreme]
27 Court on a question of law or if the state court decides a case differently than [the]
28 Court has on a set of materially indistinguishable facts.” Williams v. Taylor, 529
U.S. 362, 412–13 (2000). The only definitive source of clearly established federal
law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the

1 Supreme Court as of the time of the state court decision. Williams, 529 U.S. at 412;
2 Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004). While circuit law may be
3 “persuasive authority” for purposes of determining whether a state court decision is
4 an unreasonable application of Supreme Court precedent, only the Supreme Court’s
5 holdings are binding on the state courts and only those holdings need be
6 “reasonably” applied. Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003),
7 overruled on other grounds by Lockyer v. Andrade, 538 U.S. 63 (2003).

8 “Under the ‘unreasonable application’ clause, a federal habeas court may
9 grant the writ if the state court identifies the correct governing legal principle from
10 [the Supreme Court’s] decisions but unreasonably applies that principle to the facts
11 of the prisoner’s case.” Williams, 529 U.S. at 413. “Under § 2254(d)(1)’s
12 ‘unreasonable application’ clause, . . . a federal habeas court may not issue the writ
13 simply because that court concludes in its independent judgment that the relevant
14 state-court decision applied clearly established federal law erroneously or
15 incorrectly.” Id. at 411. A federal habeas court making the “unreasonable
16 application” inquiry should ask whether the state court’s application of clearly
17 established federal law was “objectively unreasonable.” Id. at 409. The federal
18 habeas court must presume correct any determination of a factual issue made by a
19 state court unless the petitioner rebuts the presumption of correctness by clear and
20 convincing evidence. 28 U.S.C. § 2254(e)(1).

21 The state court decision to which Section 2254(d) applies is the “last
22 reasoned decision” of the state court. See Ylst v. Nunnemaker, 501 U.S. 797,
23 803–04 (1991); Barker v. Fleming, 423 F.3d 1085, 1091–92 (9th Cir. 2005). When
24 there is no reasoned opinion from the highest state court considering petitioner’s
25 claims, the court “looks through” to the last reasoned opinion. See Ylst, 501 U.S. at
26 805; Shackelford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). Where the
27 state court gives no reasoned explanation of its decision on a petitioner’s federal
28 claim and there is no reasoned lower court decision on the claim, an independent

1 review of the record is the only means of deciding whether the state court's decision
2 was objectively reasonable. See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir.
3 2003).

4 In three decisions issued in recent past terms, the Supreme Court vigorously
5 and repeatedly affirmed that under AEDPA, there is a heightened level of deference
6 a federal habeas court must give to state court decisions. See Hardy v. Cross, 132 S.
7 Ct. 490, 491 (2011) (per curiam); Harrington v. Richter, 131 S. Ct. 770, 783–85
8 (2011); Premo v. Moore, 131 S. Ct. 733, 739–40 (2011); Felkner v. Jackson, 131 S.
9 Ct. 1305 (2011) (per curiam). As the Court explained: “[o]n federal habeas review,
10 AEDPA ‘imposes a highly deferential standard for evaluating state-court rulings’
11 and ‘demands that state-court decisions be given the benefit of the doubt.’” Felkner,
12 131 S. Ct. at 1307 (citation omitted). With these principles in mind regarding the
13 standard and limited scope of review in which this Court may engage in federal
14 habeas proceedings, the Court addresses Petitioner’s claims.

15 C. Claims and Analysis

16 As grounds for federal habeas relief, Petitioner claims the following: (1) the
17 trial court violated Petitioner’s rights to confrontation and due process by permitting
18 the prosecutor to question a witness about statements which were inadmissible under
19 Crawford v. Washington, 541 U.S. 36 (2004); (2) the trial court violated Petitioner’s
20 right to confrontation when it allowed the prosecutor to argue negative inferences
21 from a witness’s refusal to testify; and (3) cumulative error. (Pet. at 4(a).)

22 1. Right to Confrontation

23 The Confrontation Clause of the Sixth Amendment provides that in criminal
24 cases the accused has the right to “be confronted with the witnesses against him.”
25 U.S. Const. amend. VI.¹ The ultimate goal of the Confrontation Clause is to ensure
26

27 28 ¹ The federal confrontation right applies to the states through the Fourteenth
Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965).

1 reliability of evidence, but it is a procedural rather than a substantive guarantee.
 2 Crawford v. Washington, 541 U.S. 36, 61 (2004). It commands, not that evidence
 3 be reliable, but that reliability be assessed in a particular manner: by testing in the
 4 crucible of cross-examination. Id.; see Davis v. Alaska, 415 U.S. 308, 315-16
 5 (1974) (noting a primary interest secured by the Confrontation Clause is the right of
 6 cross-examination). The Clause thus reflects a judgment, not only about the
 7 desirability of reliable evidence, but about how reliability can best be determined.
 8 Crawford, 541 U.S. at 61; see, e.g., United States v. Medjuck, 156 F.3d 916, 919 n.1
 9 (9th Cir. 1998) (Confrontation Clause serves purposes of ensuring that witnesses
 10 will testify under oath, forcing witnesses to undergo cross-examination, and
 11 permitting the jury to observe the demeanor of witnesses.); Wood v. Alaska, 957
 12 F.2d 1544, 1549 (9th Cir. 1992) (the right to confrontation includes the right to cross
 13 examine adverse witnesses and to present relevant evidence).²

14 The Confrontation Clause applies to all “testimonial” statements. See
 15 Crawford, 541 U.S. at 50-51. “Testimony . . . is typically a solemn declaration or
 16 affirmation made for the purpose of establishing or proving some fact.” Id. at 51
 17 (internal quotation and citation omitted); see id. (“An accuser who makes a formal
 18 statement to government officers bears testimony in a sense that a person who makes
 19 a casual remark to an acquaintance does not.”). The Confrontation Clause applies
 20 not only to in-court testimony but also to out-of-court statements introduced at trial,
 21 regardless of the admissibility of the statements under state laws of evidence.
 22 Crawford, 541 U.S. at 50-51.

23 Confrontation Clause claims are subject to harmless error analysis. United
 24 States v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004) (post-Crawford case); see also
 25 United States v. Allen, 425 F.3d 1231, 1235 (9th Cir. 2005). For purposes of federal

27 ²Cross-examination includes the right to show the witness’s possible bias or
 28 self interest in testifying. See Chipman v. Mercer, 628 F.2d 528, 530 (9th Cir.
 1980); Skinner v. Cardwell, 564 F.2d 1381, 1388-89 (9th Cir. 1977), cert. denied,
 435 U.S. 1009 (1978).

1 habeas corpus review, the standard applicable to violations of the Confrontation
 2 Clause is whether the inadmissible evidence had an actual and prejudicial effect
 3 upon the jury. See Hernandez v. Small, 282 F.3d 1132, 1144 (9th Cir. 2002) (citing
 4 Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)); Webb v. Lewis, 44 F.3d 1387,
 5 1393 (same).

6 a. Questioning of Wallace

7 Petitioner claims that the trial court violated his rights to confrontation and
 8 due process by permitting the prosecutor to continue to question Wallace in front of
 9 the jury even after she refused to testify, specifically on whether she told police that
 10 Petitioner had confessed to the shooting. The court granted defense counsel's
 11 motion to strike the testimony, and the jury was instructed to disregard the testimony
 12 and not consider it for any purpose. See supra at 6.

13 The state appellate court summarized Petitioner's reliance on Douglas v.
 14 Alabama, 380 U.S. 415 (1965), in support of his claim.

15 Relying on *Douglas*, [Petitioner] contends the prosecutor's
 16 questions of Wallace "introduced devastating evidence about [his]
 17 involvement in the shooting." In *Douglas*, the defendant and another
 18 man, Loyd, were charged with assault with intent to murder.
 19 (*Douglas, supra*, 380 U.S. at p. 416.) The state tried Loyd first and a
 20 jury convicted him. The prosecutor called Loyd as a witness at the
 21 defendant's trial, but he asserted the Fifth Amendment and refused to
 22 answer questions about the incident. (*Ibid.*)

23 While questioning Loyd, the prosecutor read a confession
 24 Loyd allegedly made to the police wherein he inculpated the
 25 defendant. (*Douglas, supra*, 380 U.S. at p. 416.) "Under the guise of
 26 cross-examination to refresh Loyd's recollection, the [prosecutor]
 27 purported to read from the document, pausing after every few
 28 sentences to ask Loyd, in the presence of the jury, 'Did you make
 that statement?' Each time, Loyd asserted the privilege and refused to
 answer, but the [prosecutor] continued this form of questioning until
 the entire document had been read." (*Id.* at pp. 416-417, fn. omitted.)
 The statements the prosecutor read from the document "recited in
 considerable detail the circumstances leading to and surrounding the
 alleged crime; of crucial importance, they named the [defendant] as
 the person who fired the shotgun blast which wounded the victim."
 (*Id.* at p. 417, fn. omitted.)

29 The United States Supreme Court reversed the conviction. It
 30 held the defendant's inability to cross-examine Loyd about the
 31 alleged confession denied him "the right of cross examination

secured by the Confrontation Clause.” (*Douglas, supra*, 380 U.S. at p. 419.) As the high court explained, “Loyd’s alleged statement that the [defendant] fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof of both petitioner’s act and of the requisite intent to murder. Although the [prosecutor’s] reading of Loyd’s alleged statement, and Loyd’s refusals to answer, were not technically testimony, the [prosecutor’s] reading may well have been the equivalent in the jury’s mind of testimony that Loyd in fact made the statement; and Loyd’s reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.” (*Ibid.*)

(Ans. Ex. 2 at 9-10.)

Petitioner also relied on People v. Shipe, 49 Cal.App.3d 343, 355 (1975), to support his argument that the prosecutor's questioning of Wallace violated his right to confrontation.

. . . In *Shippe*, the police arrested the defendant and two other men for murdering a drug dealer. (*Id.* at pp. 345-346.) When the police arrested the defendant, he had a knife wound on his hand. (*Id.* at p. 345.) After the two other men pleaded guilty to being accessories after the fact, the prosecutor called them as witnesses at the defendant's trial. Each man answered some preliminary questions but asserted the Fifth Amendment when the prosecutor began asking questions about the incident. (*Id.* at p. 346.)

The court determined the witnesses did not have the right to assert the privilege and ordered them to answer. The prosecutor then asked one witness a series of 17 questions about the incident, including “It is not true that... you came back and saw the body of [the victim] and that [defendant] was on top of him?” and “Is it not true that you saw [the defendant] remove the wallet of [the victim] and take the knife with him?” (*Shipe, supra*, 49 Cal.App.3d at p. 347.) The prosecutor asked the second witness several questions, including “Is it not further true... that in your presence [the victim] was stabbed multiple times by your brother, [the defendant]?” (*Id.* at p. 348.) Through these leading question, “the prosecutor placed before the jury information which overwhelmingly established [the defendant] as the murderer, provided a narcotics-related motive for the crime, and provided a basis for the inference that two witnesses had revealed this information in their statements to the authorities.” (*People v. Burciago* (1978) 81 Cal.App.3d 151, 164.)

The *Shipe* court reversed the conviction and held the prosecutor's questions violated the defendant's right of confrontation. (*Shipe, supra*, 49 Cal.App.3d at pp. 349, 355.) The court characterized the prosecutor's questions as "flagrantly suggestive" and noted a prosecutor may not, "under the guise of cross-examination, get before the jury what is tantamount to devastating direct testimony." (*Id.* at pp. 349, 351.) Finally, the court

1 concluded the People could not demonstrate beyond a reasonable
 2 doubt that the violation of the defendant's right of confrontation did
 3 not contribute to the verdict because the evidence of the defendant's
 4 guilt was "entirely circumstantial." (*Id.* at p. 355.)

5 (Ans. Ex. 2 at 10-11.)

6 The state appellate court ultimately rejected Petitioner's claim:

7 *Douglas* and *Shipe* are distinguishable. In those cases, the
 8 defendant did not move to strike either the witness's nonresponsive
 9 testimony or the prosecutor's leading questions. Here, the court
 10 struck Wallace's testimony and instructed the jury not to consider the
 11 prosecution's questions as evidence. "The assumption that jurors are
 12 able to follow the court's instructions fully applies when rights
 13 guaranteed by the Confrontation Clause are at issue." (*Tennessee v.*
 14 *Street* (1985) 471 U.S. 409, 415, fn. 6; see also *People v. Smithey*
 15 (1999) 20 Cal.4th 936, 962 [distinguishing *Douglas* where the jury
 16 was instructed to disregard all improper questions and "any answers
 17 that may have been given"].)

18 Finally – in stark contrast to both *Shipe* and *Douglas* – there
 19 was independent evidence of [Petitioner]'s guilt. As noted above,
 20 Walker testified he saw [Petitioner] point a gun at Tidwell. He also
 21 testified he heard gunshots and Tidwell pleading with [Petitioner]
 22 not to shoot him. And several witnesses provided descriptions of the
 23 shooter that matched [Petitioner]'s description. The questions the
 24 prosecutor posed, therefore, were not the "only direct evidence" that
 25 [Petitioner] shot Tidwell. (Cf. *Douglas, supra*, 380 U.S. at p. 419.)
 26 Accordingly, neither *Douglas* nor *Shipe* apply here and we conclude
 27 [Petitioner] was not denied his right of confrontation.

28 (Ans. Ex. 2 at 11.)

19 Petitioner's reliance on Douglas and Shipe is clearly misplaced. The state
 20 appellate court properly distinguished Douglas and Shipe from Petitioner's case in
 21 determining that his right to confrontation was not violated. The Supreme Court
 22 overturned the conviction in Douglas because the testimony at issue was the only
 23 direct evidence of the defendant's culpability. See supra at 11-12. The Shipe court
 24 also overturned the conviction because it found that the prosecutor's leading
 25 questions resulted in the jury hearing what was "tantamount to devastating direct
 26 testimony" and the evidence of defendant's guilt was otherwise "entirely
 27 circumstantial." Id. at 12. In Petitioner's case, Wallace's testimony was not the
 28 only direct evidence of Petitioner's guilt; there was other independent evidence

1 connecting Petitioner with the shooting, including several eye-witness accounts.
2 Furthermore, the juries in Douglas and Shipe were permitted to consider the
3 testimonies at issue in their deliberations while the trial court in Petitioner's case
4 struck Wallace's testimony entirely and instructed the jury not to consider it for any
5 purpose.

6 Even if we assumed that the trial court erred in permitting the prosecution to
7 question Wallace after she refused to testify, the error was harmless. First of all, the
8 jury was instructed to disregard the testimony and not to consider it for any purpose.
9 See Weeks v. Angelone, 528 U.S. 225, 235 (2000) (stating that jurors are presumed
10 to follow the court's instructions). Furthermore, there was other direct evidence of
11 Petitioner's guilt: (1) his cousin Walker identified Petitioner as the shooter; (2) Eli.
12 identified Petitioner as the shooter; and (3) several other witnesses who saw the
13 shooting provided descriptions of the shooter that closely matched Petitioner. See
14 supra at 2-3. Based on the court's instructions to the jury and the other independent
15 evidence of Petitioner's guilt, Petitioner cannot show that the inadmissible evidence
16 had an actual and prejudicial effect upon the jury. See Hernandez, 282 F.3d at 1144.
17 Accordingly, the state courts' rejection of this claim was not contrary to, nor an
18 unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254(d).
19 Petitioner's claim is without merit and does not warrant habeas relief.

20 With respect to Petitioner's due process claim, Respondent argues that no
21 clearly established Supreme Court law provides that admission of a witness'
22 testimony, who is likely to refuse to testify, violates due process. (Ans. at 17.) In
23 his traverse, Petitioner expands on his due process claim and asserts that the
24 Fourteenth Amendment guarantees him a fair opportunity to defend against the
25 state's accusations and that Wallace's questioning before the jury violated that right.
26 (Trav. at 12-13.) A violation of the right to present a defense merits habeas relief
27 only if the error was likely to have had a substantial and injurious effect on the
28 verdict. Jackson v. Nevada, 688 F.3d 1091, 1104 (9th Cir. 2012) (citing Brecht v.

1 Abrahamson, 507 U.S. 619 (1993)). As discussed above, any error was harmless in
 2 light of the fact that the jury was instructed to disregard Wallace's testimony and
 3 that there was substantial independent evidence of Petitioner's guilt. Accordingly,
 4 Petitioner's due process claim is without merit.

5 b. Prosecutor's Closing Statement

6 Petitioner's second claim is that the trial court violated his right to
 7 confrontation when it allowed the prosecutor to argue negative inferences from
 8 Wallace's refusal to testify. At trial, the judge granted defense counsel's motion to
 9 strike the testimony from the record and prohibited the prosecutor from discussing
 10 Wallace's specific testimony. However, the prosecutor was permitted to argue in
 11 closing reasonable inferences from Wallace's refusal to testify, *i.e.*, that she did so to
 12 protect Petitioner. See supra at 6.

13 The California Court of Appeal rejected this claim:

14 Distilled to its essence, [Petitioner]'s real complaint seems to
 15 be that the court erred by allowing the prosecutor to argue an
 16 inference from Wallace's refusal to testify because the court had
 17 stricken all of her testimony. Put another way, [Petitioner] suggests
 18 there was no evidentiary basis for a negative inference because the
 19 court struck all of Wallace's testimony, including her refusal –
 20 without legal justification – to answer the prosecutor's questions. We
 21 disagree. To be sure, the court struck Wallace's testimony. But it did
 22 not strike the fact that she took the witness stand and refused to
 23 testify. The act of her unjustified refusal to answer the prosecutor's
 24 questions remained before the jury. Accordingly, the court did not
 25 err by allowing the prosecutor to argue a negative inference from
 Wallace's initial willingness to answer questions and her subsequent
 and unjustified refusal to answer questions about the incident.

26 Even if we were to assume the court erred by permitting
 27 adverse comment after striking all of Wallace's testimony, we could
 28 find the error harmless. (*Chapman v. California* (1967) 386 U.S. 18,
 20-21.) "The harmless error inquiry asks: 'Is it clear beyond a
 reasonable doubt that a rational jury would have found the defendant
 guilty absent the error?'" (*Neder v. United States* (1999) 527 U.S. 1,
 18, criticized on other grounds in *People v. McCall* (2004) 32
 Cal.4th 175, 187, fn. 14.)

29 At trial, Walker testified he saw [Petitioner] point a gun at
 30 Tidwell and heard Tidwell yell, "Quit, Boo" and "Don't do it. Don't
 31 do it, not me" as shots were fired. Eli. saw a Black man shoot
 32 Tidwell and then take money form his wallet. When Detective Day
 showed Eli. a picture of [Petitioner], Eli. recognized him as the

1 shooter. And although she did not identify [Petitioner] at trial and
 2 conceded she did not want to testify because she was scared, she
 3 stated Walker did not shoot Tidwell. [FN5] Tozier also testified
 4 Walker did not have a gun.

5 FN5. [Petitioner] makes much of the fact that certain
 6 witnesses stated the shooter did not have dreadlocks or
 7 twisties. But these witnesses all conceded they did not get a
 8 good look at the shooter's face and were not able to identify
 9 the shooter either in a photo lineup or at trial. But Walker and
 10 Eli., both of whom saw [Petitioner] either pointing a gun at
 11 Tidwell or shooting him, testified [Petitioner] wore his hair in
 12 cornrows or twistees, which matched the description of
 13 [Petitioner] given by Detective Day. In addition, Chartina,
 14 Tozier's daughter, testified that [Petitioner]'s skin tone, hair,
 15 and height looked similar to the shooter's.

16 Moreover, the court instructed the jury that the attorney's
 17 arguments were not evidence and that it could not consider stricken
 18 testimony for any purpose. " "[It is] the almost invariable
 19 assumption of the law that jurors follow their instructions." [Citation.] "[We] assume that jurors, conscious of the gravity of their
 20 task, attend closely the particular language of the trial court's
 21 instructions in a criminal case and strive to understand, make sense
 22 of, and follow the instructions given them." [Citations.]" (Sisneros,
 23 *supra*, 174 Cal.App.4th at pp. 152-153, citing *United States v. Olano*
 24 (1993) 507 U.S. 725, 740.)

25 In light of this evidence, we conclude the error was harmless
 26 beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

27 (Ans. Ex. 2 at 14-15.)

28 For the same reasons that Petitioner's first Confrontation Claim was denied as
 1 without merit, his second claim attacking the prosecutor's use of negative inferences
 2 must also be denied because any error was harmless. The jury is presumed to follow
 3 the court's instructions that the attorney's arguments were not evidence and that it
 4 could not consider stricken testimony for any purpose. See Angelone, 528 U.S. at
 5 235. Furthermore, there was other direct evidence of Petitioner's guilt, *i.e.*, the eye
 6 witness testimony of Petitioner's cousin Walker and Eli. identifying Petitioner as the
 7 shooter. Furthermore, other witnesses' descriptions of the shooter matched
 8 Petitioner's appearance. See supra at 3. Accordingly, the state courts' rejection of
 9 this claim was not contrary to, nor an unreasonable application of, Supreme Court
 10 precedent. 28 U.S.C. § 2254(d).

111

2. Cumulative Error

Petitioner's last claim is that he is entitled to habeas relief based on the cumulative effect of the two alleged state court errors. In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a defendant so much that his conviction must be overturned. See, e.g., Alcala v. Woodford, 334 F.3d 862, 893-895 (9th Cir. 2003) (reversing conviction where multiple constitutional errors hindered defendant's efforts to challenge every important element of proof offered by prosecution). However, where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation. See Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002).

Here, Petitioner has not demonstrated that there was even one constitutional error. Petitioner may disagree with the decisions of the state courts, but he has not shown that they were unreasonable under clearly established federal law. Accordingly, his claim of cumulative error must be denied.

CONCLUSION

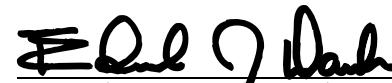
After a careful review of the record and pertinent law, the Court concludes that the petition for a writ of habeas corpus must be DENIED.

Further, a certificate of appealability is DENIED. See Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner has not made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not appeal the denial of a Certificate of Appealability in this Court but may seek a certificate from the Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the

1 Rules Governing Section 2254 Cases.

2 The Clerk shall terminate any pending motions as moot, enter judgment in
3 favor of Respondent and close the file.

4
5 DATED: 10/17/2012


6 EDWARD J. DAVILA
7 United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MARKEL RAY MORGAIN,

Case Number: CV10-05377 EJD

Petitioner,

CERTIFICATE OF SERVICE

v.

BRENDA M. CASH, Warden,

Respondent.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 10/17/2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Markel Ray Morgain G-16401
CA State Prison-Los Angeles County
P.O. Box 8457
Lancaster, CA 93539-8457

Dated: 10/17/2012

Richard W. Wiking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk